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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF SEATTLE STEVEDORE COMPANY, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 818 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of three civil penalties for grain-loading particulate emission violations having come on regularly for formal hearing before Board members Chris Smith, Chairman, and Walt Woodward on the 18th day of August, 1975, at Seattle, Washington and appellant Seattle Stevedore Company appearing through its attorney, John P. Braislin and respondent Puget Sound Air Pollution Control Agency appearing through its attorney, Keith D. McGoffin, and the Board having considered the sworn testimony, the exhibits and arguments of counsel, records and files herein and having entered on the 15th day of September, 1975, its

proposed Findings of Fact, Conclusions of Law and Order, and the Board having served said proposed Findings, Conclusions and Order upon all parties herein by certified mail, return receipt requested and twenty days having elapsed from said service; and

The Board having received no exceptions to said proposed Findings, Conclusions and Order and the Board being fully advised in the premises; now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed Findings of Fact, Conclusions of Law and Order dated the 15th day of September, 1975, and incorporated by this reference herein and attached hereto as Exhibit A, are adopted and hereby entered at the Board's Final Findings of Fact, Conclusions of Law and Order herein.

DONE at Lacey, Washington, this 3d day of November, 1975.

POLLUTION CONTROL HEARINGS BOARD

Chris Smith

CHRIS SMITH, Chairman

Walt Woodward

WALT WOODWARD, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
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IN THE MATTER OF SEATTLE STEVEDORE COMPANY, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 818 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of three $250 civil penalties for alleged grain-loading particulate emission violations of respondent's Regulation I, came before the Pollution Control Hearings Board (Chris Smith, presiding officer, and Walt Woodward) at a formal hearing in the Seattle facility of the State Board of Industrial Insurance Appeals on August 18, 1975.

Appellant appeared through John P. Braislin; respondent through Keith D. McGoffin. Jennifer Rowland, Olympia court reporter, recorded the proceedings.

EXHIBIT A

Witnesses were sworn and testified. Exhibits were admitted. Counsel made closing arguments.

At the close of respondent's case, appellant moved to dismiss two of the matters (Notices of Violation Nos. 10360 and 10361) on the ground that they were signed by an inspector with insufficient evidence to sustain the allegations. The Board reserved ruling on the motion.

From testimony heard, exhibits examined and arguments considered, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I.

Respondent, pursuant to Section 5, chapter 69, Laws of 1974, 3d Ex. Sess. (RCW 43.21B.260), has filed with this Board a certified copy of its Regulation I containing respondent's regulations and amendments the et

Section 9.15(a) of Regulation I makes it unlawful to cause or permit particulate matter to be handled, transported or stored without taking "reasonable precautions" to prevent the matter from becoming airborne. Section 9.04 makes it unlawful to cause or allow discharge of particulate matter which is deposited on the real property of others save for three exceptions, one of which is that the particulate emissions were caused by a temporary "breakdown of equipment," provided repairs are made promptly. Section 3.29 authorizes a civil penalty of not more than $250 for each violation of Regulation I; "each act of commission or omission" which aids in the violation "shall be considered a violation" under Section 3.29 "and subject to the same penalty." Section 9.16 declares that an infraction of emission regulations directly the result o "unavoidable and unforeseeable upset . . . of . . . control apparatus

shall not be deemed to be a violation if respondent is notified immediately, "together with the pertinent facts" of the problem including "time, date, duration and anticipated influence on emissions from the source." Section 3.09 authorizes respondent's Board or Control Officer, when they have "reason to believe" that Regulation I has been violated, to issue a written Notice of Violation.

II.

The locale of the three instant matters is the grain-loading facility of the Port of Seattle at Pier 86, Seattle, King County. That facility also was the locale of a consolidated matter involving numerous civil penalties levied by respondent against several concerns involved with grain loading, including the instant appellant, for particulate emission violations of Regulation I (PCHB Nos. 101, etc., Cargill, Inc., et al. v. Puget Sound Air Pollution Control Agency). That consolidated matter, held in active status before this Board for about two years, was settled after numerous informal conferences through a Stipulation and Order of Dismissal approved by this Board on January 25, 1974. In that Order, reference was made to "a full and complete report" filed with this Board on October 12, 1973, said report showing the results of techniques for loading grain which resulted in reducing dust emission levels to meet respondent's emission standards for bulk carriers. That report (Respondent's Exhibit 8 in these instant matters) details on pages 10 and 11 two approved methods for "start-up" loading of bulk carriers.

III.

In mid-February of 1975, the vessel OCEAN HAPPINESS was moored at Pier 86 for grain loading. The ship is a bulk carrier with an unusual hold configuration; it has a fore-and-aft bulkhead partly dividing the

hold from the main deck to a between deck; the bulkhead does not extend to the bottom of the hold. A ship of this unusual configuration rarely calls at the Port of Seattle; a longshoreman with 43 years experience testified he never before had loaded such a configured vessel with grain.

IV.

Appellant was employed to load grain into the OCEAN HAPPINESS. Using loading spouts of the Port of Seattle, it poured grain into the on-shore side of the fore-and-aft bulkhead without untoward incident. The grain fell into the usual inverted "ice cream cone" mound, on the on-shore side of the vessel with much of the base of the mound sliding under the bulkhead into the off-shore side until the bulkhead prevented any further such sliding.

By the afternoon of February 13, 1975, the vessel had developed a list toward shore and it was necessary to shift the spouts to a position over the fore-and-aft bulkhead and directed into the off-shore side of the hold. Because of the restrictions imposed by the top of the bulkhead and the between deck, it was not possible for the end of the spout, even with the addition of an available extension, to reach the bottom of the hold to comply with the approved procedure illustrated as "Method No. 1" on page 11 of the report (Respondent's Exhibit 8) mentioned in Finding of Fact II.

The only testimony heard by this Board was from appellant to the effect that the OCEAN HAPPINESS was not equipped with tarpaulins or tarpaulin fittings for compliance with "Method No. 2," also illustrated on page 11 of the report.

As soon as pouring of grain was commenced into the off-shore side

the vessel, it was apparent to appellant that particulate emissions were escaping into the ambient air from the open hatches (two hatches were being filled simultaneously from separate spouts). Appellant's foreman made three attempts by telephone to notify respondent of the problem but in each attempt he was unable to reach the official he had been instructed to contact. On none of the attempts did the foreman leave his name or that of appellant, and he did not leave a message describing the time, date, duration and anticipated influence of the escaping particulates.

With only a few hours remaining of appellant's crew shift and with the OCEAN HAPPINESS riding at such a listed angle that it could not be left to experience the rise and fall of the tide during the night in that position, appellant continued to pour grain into the off-shore portion of the vessel with a resultant escapement of particulates. Some of the particulate matter fell on the adjacent real property of others.

V.

Between 3:00 and 4:00 p.m. on February 13, 1975 in response to complaints received by respondent, an experienced inspector on respondent's staff, accompanied by an on-the-job-training inspector with a few days experience, visited Pier 86 and vicinity. They saw grain-dust on the real property of others. They saw spout extensions available but not being used. They went aboard the OCEAN HAPPINESS and saw spouts in two hatch openings with the ends of the spouts more than 15 feet above the level of the grain. The experienced inspector believed there was room enough for extensions to be used on the spouts. The experienced inspector was familiar with the procedures outlined in the report (Respondent's Exhibit No. 8) mentioned in Finding of Fact II; the inexperienced

inspector did not know of those procedures.

VI.

As part of her training, the inexperienced inspector prepared three notices of violation under the direction of the experienced inspector. The notices cited appellant as follows: Notice of Violation No. 10359, citing Section 9.15 "without following proper proceedures [sic]" in the second hold from the stern of the OCEAN HAPPINESS; Notice of Violation No. 10360, same citation for the third hold from the stern, and Notice of Violation No. 10361, citing Section 9.04. The experienced inspector signed Notice of Violation No. 10359; the inexperienced inspector signed the other two notices. The three notices were served on appellant.

Subsequently, and in connection therewith, respondent served on appellant three notices of civil penalty, each in the amount of $250, as follows: Notice of Civil Penalty No. 1947 (for Notice of Violation No. 10359), Notice of Civil Penalty No. 1948 (for Notice of Violation No. 10360) and Notice of Civil Penalty No. 1949 (for Notice of Violation No. 10361). The civil penalties are the subject of this matter.

VII.

Any Conclusion of Law hereinafter deemed to be a Finding of Fact is adopted herewith as same.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I.

Pursuant to Section 3.09 of Regulation I, all of respondent's violation notice forms bear the printed name of respondent's control

officer. The experienced inspector who knew of the procedures specified in the report (Respondent's Exhibit No. 8) saw sufficient circumstances aboard and near the OCEAN HAPPINESS on February 13, 1975 to give the control officer "reason to believe" that both Notices of Violation Nos. 10359 and 10360 should have been issued. While it might have been better for the experienced inspector also to have signed Notice of Violation No. 10360, his signature was not necessary. The motion to dismiss Notice of Violation No. 10360, therefore, is denied.

The motion to dismiss Notice of Violation No. 10361 is denied out of hand. The inexperienced inspector saw the grain dust deposited on the real property of others and certainly required no knowledge of the loading procedures in order to sign that notice.

II.

Appellant also attacks the penalties as being three citations for what, at most, should be only one citation. One aspect of that attack likewise is dismissed out of hand for the reason that Notice of Civil Penalty No. 1949 is based on a totally separate alleged violation of Regulation I (Section 9.04) from the alleged violation supporting the other two penalties (Section 9.15). The other aspect of the attack is to the apparent duplicative nature of the Section 9.15 alleged violations which support Notices of Civil Penalty Nos. 1947 and 1948. But this attack also fails because Section 3.29 authorizes separate penalties for "each act of commission" which aids in a violation; the two separate spouts poured grain into separate holds of the vessel and were separate acts of commission.

III.

We now are left with two broader questions to resolve. Did appellant fail to follow "proper procedures" or, in the language of Section 9.15, fail to take "reasonable precautions?" If the particulate emission was unavoidable, did appellant correctly follow the prerequisites of Section 9.16?

IV.

Appellant did not employ "Method No. 1" because it could not; we come to this conclusion after listening to the diametrically opposed testimony of an expert witness in air pollution and an expert witness in longshoring and after attaching the greater weight to the longshoreman's testimony.

As to "Method No. 2," we find appellant made no effort whatsoever to follow it. Granted that no tarpaulins were available and that the ship had no fittings to accommodate their use, everyone in this matter still is left with the report's admonition to employ "plastic" sheets. This Board certainly does not now pose as an expert in longshoring practicalities but we are impressed with the lack of testimony as to why no effort at all was made to use lightweight plastic sheets to at least cut down on the quantity of particulate matter escaping to the ambient air during the relatively short time while the grain level was rising to the point where the spouts could have been buried. Appellant made no effort in this regard and gave us no testimony to explain its failure to make an effort. We find, therefore, that appellant was in violation of Section 9.15, as cited in Notices of Violation Nos. 10359 and 10360, and in violation of Section 9.04, as cited in Notice of Violation

No. 10361.

V.

As to Section 9.16, we find it applies because the inability to bury the spouts can be construed to be a "breakdown of equipment."

Appellant made a good faith effort to comply with Section 9.16; three telephone calls are strongly in appellant's favor here. But Section 9.16 requires more than placing a telephone call. Appellant was not wise in not leaving a name or other form of identification when rebuffed in three efforts to reach a certain official on respondent's staff, and appellant failed completely to give respondent's switchboard operator any hint of why the calls were being made, to say nothing of offering to supply the "pertinent facts" of the matter as prescribed in Section 9.16. We find that appellant made an ineffectual effort to comply with Section 9.16.

VI.

While the penalties are reasonable in view of the serious air emissions, we find appellant is entitled to some leniency because of its effort relative to Section 9.16.

VII.

Any Finding of Fact herein recited which is deemed to be a Conclusion of Law is adopted herewith as same.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The appeal is denied and Notices of Civil Penalty Nos. 1947, 1948 and 1949 are sustained in their total amount of $750, but payment of $375 of that amount is suspended pending no similar violation for a period of six months from the date this Order becomes final.

DONE at Lacey, Washington, this 15th day of Sept, 1975.

POLLUTION CONTROL HEARINGS BOARD

Chris Smith
CHRIS SMITH, Chairman

Walt Woodward
WALT WOODWARD, Member